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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEANNA FOGARTY-HARDWICK, Plaintiff and Appellant, v. COUNTY OF ORANGE et al., Defendants and Respondents.	G030302 (Super. Ct. No. 01CC02379) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Stephen J. Sundvold, Judge. Affirmed.

Shumate & Associates and Mary D. Shumate for Plaintiff and Appellant.

Beam, Brobeck & West, Bryron J. Beam, and Glen A. Stebens for Defendants and Respondents.

Deanna Fogarty-Hardwick (Hardwick) appeals from a judgment that dismissed her tort and civil rights action against the County of Orange, the Orange County Social Services Agency (SSA), and several social workers (collectively, the County, unless otherwise indicated), after the trial court sustained a general demurrer

without leave to amend. Hardwick argues the complaint states a cause of action for intentional infliction of emotional distress. We cannot agree, and so affirm.

* * *

This action arises out of a juvenile dependency case filed by SSA. After the dependency petition was dismissed by stipulation of the parties, Hardwick commenced the present suit. At issue is the sufficiency of her second amended complaint, which sets out causes of action for intentional infliction of emotional distress, federal civil rights violations (under 42 U. S. C. § 1983), and an injunction. Only the tort claim is before us.[1]

The complaint alleges Hardwick's two daughters were detained by SSA after social workers "intentionally fabricated evidence." The nature of this fabrication is not made clear.

It is also alleged SSA, acting with malice, failed to include exculpatory information when it filed an amended dependency petition, and it filed a false report related to the amended petition. The amendment added an allegation that a social worker overheard Hardwick tell her children something – what is not said – that caused them to fear their father and refuse to visit him. Hardwick alleges SSA failed to include in the amended petition "exculpatory information . . . that . . . Vreeken [a social worker] was actually the individual who told the children they would be taken away from their mother and placed in a foster care home if they continued to refuse to visit with their father." She also alleges SSA submitted a report to the juvenile court, on the day the amended petition was filed, that "contained intentional false statements of [Hardwick's] conduct,

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[1] Hardwick's opening brief makes no mention of the federal or injunction claims. While her reply brief argues the federal claim was sufficient to withstand a demurrer, that argument comes too late. An appellant's failure to raise an argument in its opening brief waives the issue on appeal. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.)

knowing the statements were maliciously false . . . ." The statements in question are not identified.

Another allegation of withholding exculpatory evidence concerns a March 31, 2000 letter to SSA from the children's therapist. The therapist said the children were not doing well in foster care. Testifying at a hearing that day (about what is not revealed), Vreeken said nothing about the letter, acting on instructions from a supervisor. The supervisor, present in court with the letter, failed to reveal it to the court or Hardwick. Both social workers acted "with malice and with conscious disregard of the parental rights of [Hardwick]."

Hardwick also makes several conclusory allegations of perjury. At a March 1, 2000 hearing, SSA "misrepresent[ed] to the court that [the] children were doing well," when in fact they were emotionally depressed and physically ill. On March 29, 2000, Vreeken was "committing perjury by again repeating the false statements regarding [Hardwick's] conduct on February 13, 2000 . . . ."[2] On April 4, 2000, Vreeken "committed perjury, denying that she had made any prior statements regarding the fact that she had expressed concerns for the minor children's well being."

Hardwick does not allege the defendants intended to cause her emotional distress, but rather contends that they acted intentionally and emotional distress resulted. Alternatively, she alleges the defendants acted with a willful and conscious disregard of her parental rights, and this conduct caused emotional distress.

The trial court sustained the demurrer without leave to amend on the grounds that SSA's actions were protected by governmental immunity or, alternatively, the action was barred by collateral estoppel.[3] On the immunity issue, the judge ruled

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[2] The reference to February 13, 2000, is unclear, since the complaint does not say what is supposed to have happened on that day.

[3] The trial judge's reference to collateral estoppel indicates he gave some credence to the County's argument that Hardwick sought to relitigate court orders issued in the dependency matter. On this appeal, the County does not argue collateral estoppel supports the ruling sustaining the demurrer.

Hardwick failed to state a cause of action under Government Code section 820.21,[4] which provides that juvenile court social workers have no immunity if, acting with malice, they commit perjury, fabricate evidence, or withhold exculpatory evidence. He found the allegations of malice insufficient to come within this statutory exception to governmental immunity. We view the complaint somewhat differently, but we come to the same result.

I

We find the problem with the complaint is not malice, which is adequately alleged, but the failure to set out a prima facie case of intentional infliction of emotional distress. For that reason, the demurrer must be sustained.[5]

The elements of intentional infliction of emotional distress are: (1) extreme or outrageous conduct engaged in with the intent of causing, or reckless disregard of the probability of causing, emotional distress; (2) severe emotional distress; and (3) causation. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

Here, Hardwick fails to allege the necessary intent. She claims defendants' acts were intentional, and undertaken with willful disregard of her parental rights, but neither suffices. More than intentional conduct is required – the essence of the tort is an *intent to cause emotional distress*. Likewise, it is not enough to assert a willful disregard of Hardwick's parental rights – it is a disregard of the *risk of causing emotional distress* that makes out the claim. Since actionable intent is missing, the cause of action fails.

Hardwick argues the complaint is sufficient because it alleges the defendants acted knowingly, with malice, and caused her to suffer emotional distress. Unfortunately, this fails to grasp the problem. As we have said, it is not enough to allege

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[4] All further statutory references are to the Government Code.

[5] The failure to allege a prima facie case was first raised by the County in its appellate brief, which is permissible. A litigant may raise a new theory on appeal if it presents a pure question of law on undisputed facts (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259), as is the case here.

intentional conduct and resulting emotional distress. What is required is an *intent to cause* emotional distress. Hardwick makes no such allegation, so we have no alternative but to affirm the ruling sustaining the demurrer.

II

For the sake of completeness, we briefly address Hardwick's argument that the allegations of malicious conduct are sufficient to permit suit against the social workers under section 820.21. She is right as far as governmental immunity is concerned, but that cannot save the complaint.

The statute in question provides as follows: "Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to . . . the Welfare and Institutions Code [sections 200 to 987] shall not extend to any of the following, if committed with malice: [¶] (1) Perjury. [¶] (2) Fabrication of evidence. [¶] (3) Failure to disclose known exculpatory evidence. [¶] (4) Obtaining testimony by duress . . . ." (§ 820.21, subd. (a).) As used in this section, malice is defined as "conduct that is intended . . . to cause injury to the plaintiff or despicable conduct that is carried on . . . with a willful and conscious disregard of the rights or safety of others." (§ 820.21, subd. (b).)

The complaint adequately alleges malice for purposes of permitting suit against the social workers. Hardwick alleges social workers twice failed to disclose exculpatory evidence (the social workers' comment to the children and the therapist's letter), and they did so with a willful and conscious disregard of Hardwick's parental rights. The latter tracks the second prong of the definition of malice set out in section 820.21, subdivision (b), so it is sufficient to come with the statute. But getting around governmental immunity does not mean there is a tort cause of action. The fundamental problem remains – the complaint fails to state facts sufficient to constitute a cause of action for intentional infliction of emotional distress.

We cannot end without addressing the County's argument that section 820.21 should not apply because it contradicts the general governmental immunity statutes that would otherwise protect the social workers. The argument consists of nothing more than the naked assertion section 820.21 should not apply, unsupported by either authority or any explanation. That hardly makes the case, particularly in the face of the provision in section 820.21 that it applies "notwithstanding any other provision of the law."

Since the complaint fails to allege a prima facie cause of action for intentional infliction of emotional distress, the demurrer was properly sustained. The judgment appealed from is affirmed. Respondents are entitled to costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.